Supreme Court, U.S.
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No. 01-51 JUL 10 2001

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In The Supreme Court of The United States

ENRIQUE OCHOA, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

On Petition For Writ of Certiorari To
The United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *Murray v. United States*, 487 U.S. 533, 101 L. Ed. 2d 472, 108 S. Ct. 2529 (1988), this Court held that evidence that was observed during an illegal entry was admissible if it was seized during the execution of a warrant wholly independent of the initial illegal entry. Is evidence discovered and seized before the issuance of a valid warrant admissible under the independent source exception?

2. Where police subjectively believe that the magistrate has signed a search warrant, but the magistrate has not when police enter, search, and seize evidence, may the government rely on the good faith exception announced in *Leon v. United States*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) to avoid suppression of the evidence?

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Constitutional Provisions

Fourth Amendment 2

In the Supreme Court of the United States

No.

ENRIQUE OCHOA, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI

Petitioner, Enrique Ochoa, respectfully prays that a writ of certiorari issue to review the judgement below.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit appears at Appendix "A" to the petition (it is an unpublished opinion.)

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion on April 11, 2001. This Petition for Writ of Certiorari follows within ninety days. The petitioner invokes the jurisdiction of this Court under 28 U.S.C.§1254(1).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On August 29, 1997, the police presented the Magistrate applications for five search warrants. These warrants were for Room 137 of the Ramada Inn, Room 206 of the Super 8 Motel, 140 Melinda Lane, 144 Melinda Lane, and Hambrick's house in Walton, Kentucky. The warrants, which were to be executed simultaneously, were part of an ongoing investigation into methamphetamine trafficking in Northern Kentucky. The warrants were based in part on the information received the previous day that thirty to fifty pounds of methamphetamine had arrived in the area. Jim Daley, the executive director of the Northern Kentucky Strike Force, was responsible for coordinating and overseeing this operation. Daley stated that it was important to execute the warrants simultaneously because the officers were worried that some of the dealers, including Vanaman, were armed. They were also concerned that the dealers could warn each other and jeopardize the execution of the warrants and recovery of the contraband. (Appendix, page 4 - 5.)

At approximately 4:00 a.m. on August 29, 1997,

Detective Scott Lay, a member of the Northern Kentucky Strike Force, took five search warrants to Boone County, Kentucky, District Court Judge Charles Moore in Ft. Mitchell, Kentucky. Detective Lay swore to the accuracy of the information affidavit attached to each warrant, which were identical. Detective Lay inadvertently failed to sign two of the affidavits for the Super 8 Motel and the Ramada Inn, however. (Appendix, page 5.)

When Detective Lay presented the warrant applications to Judge Moore, he had not yet identified the room numbers for the two hotel rooms. Judge Moore testified that although he had decided to issue them, he would not sign the warrants for the two hotel rooms until the room numbers could be supplied. At 4:20 a.m., Judge Moore executed the remaining search warrants. (Appendix, page 5.)

Detective Lay told Mr. Daley that the judge would not sign the warrants for the two hotel rooms. At that time, Detective Lay and Mr. Daley did not realize that Detective Lay had not signed the affidavits for the two hotel rooms. They thought that Judge Moore had signed the warrants. (Appendix, page 5 - 6.) Daley also thought that once the room numbers were provided, Judge Moore would sign the warrants. (Appendix, page 6.)

Daley sent Officer Ben Booher to the judge's house to wait for this information. When Booher left, he was aware of the Super 8 Motel room number. Meanwhile, efforts were made to coordinate the roughly thirty policemen involved in the investigation. At approximately 7:00 a.m., five search teams assembled near their respective search locations. (Appendix, page 6.)

At approximately 7:00 a.m., Judge Moore advised Officer Booher that Lay needed to sign the affidavits for the

Ramada Inn and Super 8 hotel warrants. Between 7:12a.m. and 7:15a.m., Daley told Lay to return to Judge Moore's house. Daley also told Detective Lay to call as soon as he had signed the affidavit because the search teams could not to wait for Detective Lay to return. (Appendix, page 6.)

At approximately 7:30 a.m., Detective Lay signed the remaining affidavits in the judge's presence and supplied the room number on the warrant for the Super 8 Motel. Booher remained outside. Judge Moore did not notarize Detective Lay's signature until 8:00 a.m., however. (Appendix, page 6.)

At 7:31 a.m. Detective Lay called Daley and mistakenly advised Daley that the warrants were ready to be executed. Because the room number for the Super 8 Motel had been inserted into the warrant and Detective Lay had signed the affidavit, Daley thought the warrant was complete. (Appendix, page 6.)

At 7:43 a.m., Detective Ellis, who was part of the team at Hambrick's residence, gave the "ready to go" signal and each team entered their respective properties. At that time, Daley believed Judge Moore had signed and authorized the Ramada Inn warrant. (Appendix, page 6 - 7.)

At 7:46 a.m., Mr. Daley advised the search teams that the subject in Super 8 motel room, Ochoa, was armed. Ochoa was advised of his Miranda rights. Ochoa stated that Orta had rented the room, but had left the day before. Ochoa was found at the Super 8 Motel with a 10-mm semi-automatic weapon, fully loaded and "cocked." In the nightstand officers found records referencing drug sales. They found $10,000 and twenty-seven pounds of methamphetamine. Ochoa admitted that the firearm belonged to him. (Appendix, page 7.)

Detective Lay noted on the warrant that it was executed

at 8:05 a.m., which reflected his estimate of the time they had finished securing the room and interviewing Ochoa. (Appendix, page 7.)

On September 11, 1997, Vanaman, Ochoa, and Orta were charged with conspiring to traffic and trafficking in methamphetamine. On March 11, 1998, a second superseding indictment was returned adding five defendants, including Hambrick and McIntosh to the conspiracy charge. Vanaman, Ochoa and Orta moved to suppress the evidence seized from their respective rooms. The district court denied the motions to suppress. A jury convicted the defendants. At sentencing, the petitioner herein Enrique Ochoa was sentenced to four hundred months in the custody of the Attorney General. (Appendix, page 10.)

In affirming the denial of the motion to suppress the evidence seized at the Super 8 Motel, the Court of Appeals ruled that the initial entry into the room was illegal because "the warrant was undisputed that the warrant was signed within fifteen minutes of the illegal entry." (Appendix, page 16 - 17.) The Court held as follows:

> The officers had a good faith belief that Judge Moore had signed the Super 8 motel warrant at 7:30 a.m. when they entered the room at 7:46 a.m. Lay returned to the Judge's residence at 7:30 a.m., signed the affidavit, and wrote the room number on the face of the warrant. Lay then told Daley the paperwork had been signed. Daley testified that he thought that the judge had signed the warrant. Thus, although the officers' initial entry of the room was illegal, it is undisputed that the warrant was signed within fifteen minutes of the illegal entry. As the magistrate judge found, the officers' belief was reasonable under the circumstances.

(Appendix, page 17.)

The Court then ruled that the evidence found in Mr. Ochoa's room was admissible because it would inevitably have been discovered. The Court held:

> In addition, the evidence seized from the Super 8 Motel room was admissible under the inevitable discovery doctrine. *See Murray v. United States*, 487 U.S. 533, 537 (1988) (holding that evidence discovered during a police officer's illegal search need not be suppressed if that evidence is also discovered during a later search pursuant to a valid warrant that is wholly independent of the illegal search); *United States v. Kennedy*, 61 F.3d 494,497-98 (6th Cir. 1995); *Leake*, 95 F.3d at 412. Here, it is undisputed that the warrant was signed fifteen minutes after the officers entered the room. The warrant is based upon information wholly independent of anything observed during the initial entry. As the magistrate judge observed: "Where, as here, the mechanism to obtain the search warrant was begun before the alleged police misconduct, and the search warrant was obtained without the use of any information obtained through the misconduct, no deterrence rationale supports the exclusion of the evidence."

(Appendix, page 17 - 18.)

REASONS FOR GRANTING THE WRIT

I

THE INEVITABLE DISCOVERY DOCTRINE SHOULD NOT APPLY WHERE THE SEARCH AND THE SEIZURE ARE COMPLETE BEFORE THE WARRANT IS OBTAINED.

The exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search, *Weeks v. United States*, 232 U.S. 383, 58 L Ed 652, 34 S. Ct. 341 (1914), and of testimony concerning knowledge acquired during an unlawful search, *Silverman v. United States*, 365 U.S. 505, 5 L Ed 2d 734, 81 S. Ct. 679, 97 ALR2d 1277 (1961). Beyond that, the exclusionary rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes "so attenuated as to dissipate the taint," *Nardone v United States*, 308 U.S. 338, 341, 84 L Ed 307, 60 S. Ct. 266 (1939). See *Wong Sun v United States*, 371 U.S. 471, 484-485, 9 L Ed 2d 441, 83 S. Ct. 407 (1963).

In *Segura v. United States*, 468 U.S. 796, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984), the Court dealt with the question of whether the trial court should have suppressed the evidence that the police had not observed during the initially illegal entry into home, but observed and seized at a later time during the execution of a valid search warrant. This Court held that evidence found and seized during the execution of a valid search warrant, that is, a warrant not tainted by the initial illegal police entry, was legally obtained and admissible evidence. *Id.* The Court did not disturb the ruling of the lower

court suppressing the introduction into evidence of the items seen and seized immediately after the illegal entry and before the execution of the warrant. The Court wrote, "an entry in the absence of exigent circumstances is illegal . . . [O]fficers who enter illegally will recognize will recognize that whatever evidence they discover as a direct result of the entry may be suppressed, as it was by the Court of Appeals." *(Id.*, at 468 U.S. 812.)

In *Murray v. United States*, 487 U.S. 533, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988), the Court expanded upon *Segura, id.*, and held that evidence that was observed during an illegal entry, but not seized until the securing of a valid warrant, was admissible if it was seized during the execution of a warrant wholly independent of the initial illegal entry. (*Id., at* 487 U.S. 538.) In *Murray* the agents had broken into a warehouse in which they saw numerous burlap-wrapped bales. The agents did not disturb the bales. The bales were not opened or seized before the warrant was obtained.

Here, the executing officers believed that they had a warrant to search, but did not have one until after they had entered the motel room, conducted a search, and interviewed the petitioner. Carelessness, can best describe the actions of the executing officers who gave the order to enter and search the room before they had secured the search warrant.

The Court has stated frequently that the exclusionary rule is principally designed to deter violations of the Fourth Amendment. See, e.g., *United States v. Leon*, 468 U.S. 897, 906, 82 L Ed 2d 677, 104 S. Ct. 3405 (1984); *Elkins v. United States*, 364 U.S. 206, 217, 4 L Ed 2d 1669, 80 S. Ct. 1437 (1960). By excluding evidence discovered in violation of the Fourth Amendment, the rule "compel[s] respect for the constitutional guaranty in the only effectively available way, by removing the incentive to disregard it." *Id.*, at 217, 4 L Ed 2d

1669, 80 S. Ct. 1437. The Court has crafted exceptions to the exclusionary rule when the purposes of the rule are not furthered by the exclusion. The independent source exception to the exclusionary rule "allows admission of evidence that has been discovered by means wholly independent of any constitutional violation." *Nix v. Williams*, 467 U.S. 431, 443, 81 L Ed 2d 377, 104 S. Ct. 2501 (1984); see *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, 64 L Ed 319, 40 S. Ct. 182, 24 ALR 1426 (1920). The independent source exception, like the inevitable discovery exception, is primarily based on a practical view that under certain circumstances the beneficial deterrent effect that exclusion will have on future constitutional violations is too slight to justify the social cost of excluding probative evidence from a criminal trial. See *Nix v. Williams, supra*, at 444 - 446, 81 L Ed 2d 377, 104 S. Ct. 2501; cf. *United States v Leon, supra*, 906-909, 82 L Ed 2d 677, 104 S. Ct. 3405. When the seizure of the evidence at issue is "wholly independent of," the constitutional violation, then exclusion arguably will have no effect on a law enforcement officer's incentive to commit an unlawful search.

Unlike the events in *Murray, id.*, the officers here did more than merely illegally enter the Super 8 Motel room. They conducted a search and a seizure. By the time the warrant was signed the officers had entered the room seized a firearm and drugs and had completed their interview of Mr. Ochoa. During his interview he admitted to being in possession of the weapon. (Appendix, page 7.) Nothing more was left to be done by the officers. Thus, this case presents a different factual scenario to that in *Murray, id.* Here, the search and the seizure were completed before the warrant was signed. The search and the seizure were not wholly independent of the warrant violation. The warrant was an after-the fact-event that was irrelevant to the actual search and seizure of the evidence.

The Court of Appeal's holding provides no incentive for police to act with care and circumspection, but sanctions

police negligence in failing to comply with the Fourth Amendment's warrant requirements. *Murray* should be limited to those situations where the seizure of the evidence occurred after a valid warrant has been obtained. All evidence discovered and seized before the valid warrant is obtained should be suppressed in order to assure that police will not carelessly violate the Fourth Amendment's warrant requirements.

II

THE GOOD FAITH EXCEPTION SHOULD NOT APPLY WHERE IT WAS THE POLICE AND NOT THE MAGISTRATE WHO COMMITTED THE ERROR.

The Court of Appeals ruled that while the initial entry into the motel room was illegal, it was nevertheless based on good faith. The Court's reasoning was based on an extension of this Court's holding in *United States v. Leon* 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). The Court of Appeals wrote in part as follows:

> "Although the warrant had not been signed when the officers entered the motel room, the officers had a reasonable belief that it had been signed. As the magistrate judge held:
>
> Certainly the belief of the officers in this case fits within the language of the good-faith exception established in *Leon*, 468 U.S. at 917 [*United States v. Leon* 468 U.S. 897 (1984)], in that the officers were acting "in the objectively reasonable belief that their conduct did not

> warrant under which police were operating was later found to be defective; here, the officers were operating under the belief that a warrant had been signed when it had not. Although the circumstances differ somewhat, the reasons behind the exception apply. No deterrent effect can be obtained when the police were acting under objectively reasonable belief that their behavior did not violate the defendant's Fourth Amendment rights. *See id.* As discussed above, the officers here did have the necessary objectively reasonable belief that Judge Moore had signed the warrant."

(Appendix, page 16 - 17.)

In *United States v. Leon, id.*, the Supreme Court held that under certain circumstances the exclusionary rule "should be modified so as not to bar the admission of evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective." *United States v. Leon, id., at* 468 U.S. 897, 905 (1984). The philosophy underlying this decision was that police officers should not be punished when they act under a good faith belief that a magistrate, after reviewing the affidavit and signing the warrant properly issued the warrant. "[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates." *Id,* at 916.

The situation in this case, however, does not involve an error by the magistrate, but rather police errors and/or misconduct. There was no defective warrant in this case. When the police entered the Super 8 Motel there was no warrant. The warrant at issue, along with another of the five warrants, was missing necessary information. The judge correctly insisted that the missing information be written into

correctly insisted that the missing information be written into the warrant before he would sign it. In addition, the affidavit for the warrant had not been signed by the affiant, Detective Lay, when the warrant application was presented to the magistrate.

Detective Lay returned to the judge's home and signed the affidavit for the Super 8 Motel. He signed the affidavit at 7:30 a.m. At 7:31 a.m., Detective Lay advised Mr. Daly that the warrants were ready to be executed. Because the room number for the Super 8 Motel had been inserted into the warrant and Detective Lay had signed the affidavit, Mr. Daly thought the warrant was complete. (Appendix, page 6.) Entry into the room occurred at 7:46 a.m. However, the judge did not sign the search warrant until 8:00 a.m. (Appendix, page 6.)

The police did not seek to verify when the warrant was signed by the judge, but merely assumed that he would merely flip the page and sign the warrant once it was signed by Detective Lay.

This situation falls outside of the Court's holding in *Leon, id.* The Court should not permit the expansion of the good faith doctrine to warrantless searches where the police have committed the error and not the magistrate/judge. In this matter, it was the magistrate/judge who was careful to comply with the particularity requirements of the Fourth Amendment by insisting that the room number at the Super 8 Motel be included in the warrant. It was also the magistrate/judge who insisted that the affidavit be signed by the affiant. The police, on the other hand, failed to verify that the judge had signed the warrant before they entered the Super 8 Motel room.

This is not the type of error that the good faith exception announced in *Leon, id*, should insulate police against. The fundamental difference here is that when the

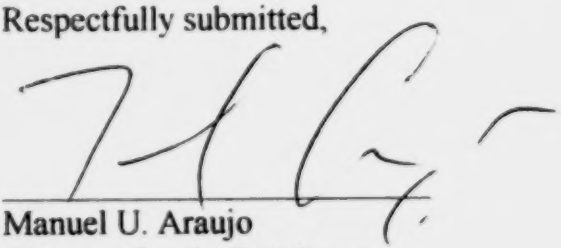
did not rely on a facially valid warrant determined in hindsight to be defective. Here the police action was based on their own negligence, the unverified assumption that the judge would issue the warrant once the affiant had signed the affidavit and wrote in the room number on the warrant. The police failure to assure themselves that a warrant had been issued is not objectively reasonable, and is the type of failure that will encourage the police to neglect to comply with the Fourth Amendment's warrant requirements before an entry and search are conducted. Permitting the good faith exception announced in *Leon* will erode the Fourth Amendment's warrant requirement protections.

CONCLUSION

Based on the foregoing reasoning and authority, the petitioner, Enrique Ochoa, respectfully urges this Court to grant the Petition for Writ of Certiorari.

Dated: July 9, 2001

Respectfully submitted,



Manuel U. Araujo
Attorney for the Petitioner
Enrique Ochoa

PROOF OF SERVICE

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

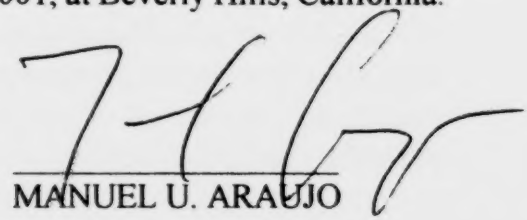
I, Manuel U. Araujo, am a resident of or employed in the aforesaid county, State of California, I am over the age of eighteen years and not a party to the within action, my business address is 8484 Wilshire Boulevard, Suite 605, Beverly Hills, CA 90211.

On July 9, 2001, I served the foregoing, **PETITION FOR WRIT OF CERTIORARI** by mailing three true copies and the **Appendix** thereof with first class postage affixed thereto and deposited in the United States mail to:

The Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

I declare under the penalty of perjury that the foregoing is true and correct, and further declare that I am a member of the bar of this Court.

Executed on July 9, 2001, at Beverly Hills, California.



MANUEL U. ARAUJO